No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, New York County, entered on January 7, 1941, on remittitur from the Court of Appeals (R. 67–68).

OPINIONS BELOW

The memorandum opinion of the Supreme Court of New York, New York County (R. 52) is not reported. Judgment of affirmance by the Appellate Division of the Supreme Court of the State

of New York in the First Judicial Department (R. 57) was entered without opinion. The *per curiam* opinion of the Court of Appeals of the State of New York (R. 71–72) has not yet been reported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on December 31, 1940 (R. 65–66); the judgment of the Supreme Court, New York County, on remittitur from the Court of Appeals was entered on January 7, 1941 (R. 67–68). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

The decision of the court below involves a title and right specially set up and claimed by the petitioner under the Constitution, laws, authority, and a treaty of the United States within Section 237 (b) of the Judicial Code, as amended. The decision of the court below that state law, rather than federal law as the petitioner contended, determines the validity of the petitioner's title to the property involved, and that under state law alleged foreign creditors and stockholders of the former First Russian Insurance Company, and not the petitioner, are entitled to the property, involves substantial questions which, petitioner contends, were decided contrary to a directly applicable decision of this Court. *United States* v. *Belmont*, 301 U. S. 324. The precise question here involved

was before this Court in *United States* v. *Moscow Fire Insurance Co.*, 309 U. S. 624, where the decision of the Court of Appeals of New York (280 N. Y. 286), upon which the decision in the instant case is rested, was affirmed by an equally divided court. The only difference between the two cases is that in the *Moscow* case, in which evidence was taken, there was an adverse decision below on a question of foreign law. Other cases believed to sustain jurisdiction of this Court are *United States* v. *Belmont, supra; United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *Stanley* v. *Schwalby*, 162 U. S. 255.

Petitioner raised these substantial federal questions in its original pleading in this action in the state court (R. 19, 22, 31), by appeal from the judgment against petitioner (R. 55), and by written and oral arguments on appeal which were rejected by the state appellate courts.

QUESTIONS PRESENTED

The Government asserts title to personal property in New York of a dissolved Russian Insurance Company, remaining after payment of domestic creditors and transferred by Soviet law to the Soviet Government and then assigned by international compact to the United States. Its claim that this surplus property should be delivered to the United States as assignee of the Soviet Government, and that it should be permitted to contest the claims of foreign stockholders and creditors of

the Company, depends upon the following questions:

1. Whether the Government's title and claims are to be determined by federal law or by state law.

2. Whether, under federal law, the decrees of the Soviet Government nationalizing the property of the Insurance Company located in New York must under the international compact be recognized and enforced by the courts of New York.

3. Whether the United States branch of the former Insurance Company may be regarded as a separate organization created and regulated by New York law, and whether under New York law the United States has title to this property.

STATEMENT

The United States brought the instant action against the respondent,[1] the Superintendent of Insurance of New York, to recover the assets of the New York branch of the First Russian Insurance Company, which remained after the payment of the claims of domestic creditors. The complaint alleged that such assets had by Russian law passed

[1] The policy holders and claimants asserting rights in and to the surplus assets of the insurance company were made defendants below. Their claims are all subordinate to the right of the Superintendent of Insurance to apply the surplus assets to the payment of their claims.

to the Government of Russia and had been assigned to the United States by that Government. The complaint was dismissed for failure to state a cause of action. The material facts set forth in the bill of complaint are substantially as follows:

The First Russian Insurance Company, a corporation organized under the laws of the former Empire of Russia (R. 19), established a United States branch in the State of New York in 1907 (R. 22). In compliance with the laws of that state the company deposited with the Superintendent of Insurance of New York certain assets which were to secure the payment of all claims resulting from the transactions of the New York branch. In 1918 the Russian Government by various laws, decrees, enactments, and orders made the business of insurance in all of its forms a state monopoly, dissolved all insurance companies, and cancelled the debts of such companies and the rights of the stockholders to any claims therein (R. 23). These laws and decrees also nationalized all of the assets and property of the Russian insurance companies wherever situated (R. 23–24).

The New York branch of the First Russian Insurance Company continued to do business in New York until 1925 when the respondent took possession of its assets, pursuant to an order of the Supreme Court of New York, which directed him to determine and report upon the claims of the policyholders and creditors of the company in the

United States (R. 25–26). Thereafter, all claims arising out of the business of the United States branch of the company (hereinafter referred to as the claims of domestic creditors) were fully paid by respondent (R. 26–27) and there remained in his hands after payment of all domestic claims approximately $1,335,653.73. (R. 27.) In determining the disposition that should be made of this surplus, the New York Court of Appeals, on February 10, 1931, directed that the respondent proceed to determine and pay claims of certain foreign creditors. 255 N. Y. 415, 423 (R. 28–29). The respondent thereupon proceeded with the liquidation of the claims of foreign creditors. From time to time certain claims have been allowed, and certain payments have been made thereon (R. 29–32). The major portion of the allowed claims have not been paid, their payment being stayed pending the disposition of the claim of the United States (R. 34).

On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and in the course of and as an incident to that recognition accepted an assignment from that Government of all claims which it had against nationals of the United States as successor to prior Governments of Russia, or otherwise (R. 31).

On November 14, 1934, while the liquidation proceedings were pending, the United States com-

menced a suit against respondent in the United States District Court for the Southern District of New York, seeking to recover the assets still remaining in the hands of the respondent, but this Court concluded that inasmuch as the *res* was in the custody of a state court, federal courts lacked jurisdiction to dispose of the controversy and remitted the United States to the state courts for the determination of its claim (R. 32–33). *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463. Thereafter, the present suit was instituted in the Supreme Court of New York.[2]

Following the decision of the Court of Appeals of New York in the *Moscow* case, the Supreme Court of New York on respondent's motion dismissed the complaint of the United States and entered summary judgment for respondent (R. 8–9). The Appellate Division on May 17, 1940, affirmed without opinion (R. 57). On appeal pursuant to leave granted by the Appellate Division (R. 61) the Court of Appeals on December 31, 1940 (R. 71–72), affirmed in a *per curiam* opinion on the

[2] Prior to the institution of the instant case, the United States moved for leave to intervene in the liquidation proceedings then being conducted by the respondent. The motion was denied on March 14, 1936, "without prejudice to the institution of the time-honored form of action" (R. 33–34). That order was affirmed by the Appellate Division without opinion on June 30, 1936, and the Appellate Division and the Court of Appeals denied motions of the United States for leave to appeal to the Court of Appeals on October 23, 1936, and December 1, 1936, respectively (R. 34).

authority of *Moscow Fire Insurance Co.* v. *Bank of New York*, 280 N. Y. 286, aff'd by an equally divided court, 309 U. S. 624.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the right of the United States, as assignee of the Soviet Government, to the surplus assets of a dissolved Russian insurance corporation is governed by the law of the State of New York.

2. In failing to hold that the right of the United States to the surplus assets as assignee of the Soviet Government is governed by federal law.

3. In failing to hold that, under federal law, the decrees of the Soviet Government nationalizing property located in the State of New York and belonging to a Russian corporate national must under the Litvinov Assignment be recognized and given effect by the courts of New York.

4. In holding that the New York branch of the First Russian Insurance Company existed as a separate and distinct corporate entity even after the dissolution of the First Russian Insurance Company by the law of the state of its creation.

5. In holding that the nationalization decrees of the Soviet Government relating to insurance companies had no effect upon surplus personal property of the dissolved Russian Insurance Company located in the State of New York.

6. In holding that the claims of stockholders of the dissolved corporation and foreign creditors thereof were superior to those asserted by the United States.

7. In holding that the Soviet Government did not become the successor to all right, title and interest of the First Russian Insurance Company.

8. In holding that the United States was not entitled to any residue of the surplus funds of the First Russian Insurance Company even if the claims of creditors and stockholders were superior to the claim of the United States.

9. In holding that under the Litvinov Assignment the rights to the surplus property which the Government seeks to enforce are subject to state law.

10. In holding that the United States as a matter of state law acquired no title to the surplus assets of the First Russian Insurance Company.

11. In holding that Section 27 of the Insurance Law of New York conferred jurisdiction upon the courts of New York to make distribution of the surplus funds of the dissolved Russian Insurance Company after all domestic creditors and claimants of that company had been paid.

12. In affirming the judgment of the Appellate Division of the Supreme Court of New York and the judgment of the Supreme Court of the State of New York dismissing the complaint.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, in affirming the dismissal of the complaint, did so on the authority of its prior decision in *Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286, aff'd by an equally divided court, 309 U. S. 624. The questions involved in this proceeding are the same as those in the *Moscow* case, save that, in this case, the question whether the Soviet decrees were intended to reach the assets of Russian insurance companies located abroad is not in issue, the allegation of the complaint that the decrees extended to such assets having been admitted by the motion. Cf. *United States* v. *Belmont*, 85 F. (2d) 542, 546 (C. C. A. 2d), reversed on other grounds, 301 U. S. 324, 327.[1] This Court having recently granted

[1] The motion to dismiss the complaint in the court below was stated to be under the summary judgment provisions of Rule 113 of the New York Rules of Civil Practice, as well as on the ground that the complaint was insufficient in law (R. 10), but it is clear that no factual issue as to the Russian law was presented. The supporting affidavit expressly disclaimed any intention to raise an evidentiary issue (R. 13) and the Court of Appeals declared that "without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R. 71-72). Moreover, the present action is in equity (see *103 Park Ave. Co.* v. *Exchange Buffet Corp.*, 203 App. Div. 739; *United States* v. *Manhattan Co.*, 276 N. Y. 396, 402) and, under New York practice, the issue of the construction of the Russian law could not have been presented on this motion.

certiorari in the *Moscow* case (308 U. S. 542), the reasons for granting the writ in this case need only briefly be stated here.

1. The decision below is in direct conflict with the decision of this Court in *United States* v. *Belmont*, 301 U. S. 324. In that case the Court held that the effect of the recognition of the Soviet Government and the Litvinov Assignment was "to validate, so far as this country is concerned" (*id.* at 330) the decrees of the Soviet Government nationalizing all property, wherever located, of Rus-

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The first five subdivisions of Rule 113 of the Rules of Civil Practice do not apply to equitable actions. *Albertson* v. *Fidelity & Deposit Co.*, 253 App. Div. 801; *103 Park Avenue Co.* v. *Exchange Buffet Corp.*, 203 App. Div. 739; *Fiscella* v. *Fridman*, 169 Misc. 327; *Anderson* v. *Title Guarantee & Trust Co.*, 248 App. Div. 895; *Ttacy* v. *Danzinger*, 249 App. Div. 46; *Newark Fire Ins. Co.* v. *Brill*, 251 App. Div. 399. Subdivisions 6, 7, and 8 of the Rule are patently inapplicable upon their face. The only provision of Rule 113 which might have been applicable is that contained in the fifth paragraph, authorizing summary judgment "where the defense is founded upon facts established prima facie by documentary evidence or official record." This contemplates a case where the document or official record is in itself proof of the defense asserted. See, e. g., *Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459; *Wels* v. *Rubin*, 254 App. Div. 484. Here the "fact" involved was the intention of the Russian decrees as a matter of Russian law. The circumstance that evidence on this question was introduced in the *Moscow* case does not make that mass of testimony an "official record" of the kind contemplated. Moreover, the elementary requirement that a party attach to his papers copies of all documents relied on (*Neff* v. *Palmer*, 131 Misc. 671; *Pross* v. *Foundation Properties, Inc.*, 158 Misc. 304, 307; *Wels* v. *Rubin*, *supra*) was not complied with, nor were any specific documents referred to.

sian corporate nationals, including a bank deposit in the United States; that "no state policy can prevail against the international compact here involved" (*id.* at 327); and that "state constitutions, state laws, and state policies are irrelevant * * *" (*id.* at 332). The court below, in plain disregard of the decision in the *Belmont* case, has held that the validity of the title acquired by the United States under the Litvinov Assignment is governed exclusively by state law.

2. The decision below is not based on any independent and adequate non-federal ground. The material allegations of fact were admitted by the motion. And the decision that the local branch of the First Russian Insurance Company is a "complete and separate organization", the assets of which cannot be reached by the domiciliary state of the parent corporation, necessarily presents a federal question. The status of the local branch can be material only for the purpose of determining whether the surplus assets belonged to a domestic corporation beyond the jurisdiction of the Soviet Government at the time of the nationalization decrees. The court below, however, did not hold that the assets belonged to the New York branch; it expressly recognized, in accordance with its own prior decisions,* that at the time of the nationalization

* *Matter of People (Second Russian Ins. Co.)*, 256 N. Y. 177, 181; *Matter of People (Moscow Fire Ins. Co.)*, 255 N. Y. 433; *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248;

decrees the surplus assets belonged to the parent corporation domiciled in Russia. The *Belmont* case squarely holds that state law is irrelevant to the validity of the nationalization of the property of such Russian corporate nationals, even though the property is located within the state, and further holds that as a matter of federal law, the nationalization is valid. It is immaterial that in this case the Russian corporation engaged in business in New York through the New York branch. The state may enforce the conditions prescribed for the conduct of the corporation's domestic business, but it did not acquire authority nor did it prior to the *Moscow* decision attempt to prescribe the rule of law by which the validity of the title to the surplus assets should be determined after the conditions had been satisfied. At all events the question whether the *Belmont* decision precludes the application of state law in these circumstances is one which can authoritatively be determined only by this Court.[5]

James & Co. v. *Rossia Ins. Co.*, 247 N. Y. 262; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148; *Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147.

[5] In the event the petition is granted the Government will also argue that there is no fair and substantial basis in state law, independently determined, for the ruling below that the local branch is a separate and indepedent organization (cf. *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 119; *Lawrence* v. *State Tax Comm.*, 283 U. S. 276, 283; *Broad River Co.* v. *South Carolina*, 281 U. S. 537, 540; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 744–745; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Ward* v. *Love County*, 253

3. Practically the same substantial questions here involved were first presented to this Court by the Government's petition for certiorari in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463. This Court stated in its opinion that certiorari had been granted "Because of the nature and importance of the questions presented" (296 U. S. at p. 471), and in remitting the Government to the state court for adjudication of its title, carefully pointed out that any federal question presented in the state court might be reviewed by this Court for final decision.* The Government's petition was again granted in the *Moscow* case (308 U. S. 542), where this Court affirmed, by an equally divided Court of six Justices.

U. S. 17, 22; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261), and further, that the state law should be independently determined by this Court, the denial of the title of the United States by a state court necessarily involving a federal question which may be reviewed by this Court. *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186, 197; *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *Stanley* v. *Schwalby*, 162 U. S. 255, 278–279; *United States* v. *Perkins*, 163 U. S. 625; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22.

* The Court stated in its opinion (296 U. S. 479):

> In this instance it cannot be doubted that the United States is free to invoke the jurisdiction of the state court for the determination of its claim, and the decision of the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, § 237, 28 U. S. C. 344.

Confusion has resulted and in spite of years of litigation the Government's rights under the Litvinov Assignment have not been definitely determined. Cf. *Hines* v. *Davidowitz*, No. 22, this Term, decided January 20, 1941, n. 19. In *United States* v. *Manhattan Co.*, 276 N. Y. 396, the court below held that a complaint substantially identical to that involved in the present case stated a good cause of action and remitted the case to the lower New York courts for further proceedings.[7] Such proceedings have been held in abeyance because of the subsequent litigation in the *Moscow* case and in this action. Similar uncertainty exists with respect to the Government's claims involving assets of other Russian companies in other courts.[8]

The majority and concurring opinions of this Court in the *Belmont* case, the majority and dissenting opinions of the court below in the *Moscow* case, and the equal division of this Court in that case, indicate a contrariety of judicial views which appropriately should be finally settled by this Court.

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[7] In *Bettman* v. *Northern Ins. Co.*, 134 Ohio St. 341, the Supreme Court of Ohio followed the decision of this Court in the *Belmont* case and that of the Court of Appeals of New York in *United States* v. *Manhattan Co.*, *supra*, to reach a result in substantial conflict with the decision of the Court of Appeals in this case.

[8] There are about 15 cases pending in various state and federal courts involving the claim of the United States to the property in this country of nationalized Russian Corporations.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1941.

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